

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS (Boston)

3 No. 1:22-cr-10141-WGY

4  
5 UNITED STATES OF AMERICA

6  
7 vs.

8  
9 SEAN O'DONOVAN

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12  
13 For Hearing Before:  
14 Judge William G. Young

15 Motion to Suppress

16  
17 United States District Court  
18 District of Massachusetts (Boston.)  
19 One Courthouse Way  
20 Boston, Massachusetts 02210  
21 Monday, December 19, 2022

22 \*\*\*\*\*

23 REPORTER: RICHARD H. ROMANOW, RPR  
24 Official Court Reporter  
25 United States District Court  
One Courthouse Way, Room 5510, Boston, MA 02210  
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A P P E A R A N C E S

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1 P R O C E E D I N G S

2 (Begins, 2:00 p.m.)

3 THE CLERK: Now hearing Criminal Matter 22-10141,  
4 the United States of America versus Sean O'Donovan.

5 THE COURT: Good afternoon. Would counsel  
6 identify themselves.

7 MS. BARCLAY: Good afternoon, your Honor,  
8 Christina Barclay for the United States.

9 MR. WEINBERG: Good afternoon, your Honor, Martin  
10 Weinberg on behalf of Sean O'Donovan, who sits to my  
11 right, your Honor.

12 THE COURT: Yes. Mr. Weinberg, I will hear you.  
13 I will -- I think I should say that having looked at  
14 Judge Saris's careful analysis, you would seem to have  
15 an uphill climb.

16 MR. WEINBERG: Yes, and I realize that on December  
17 2 the phone cap speaker, and I was going to advise the  
18 Court and Ms. Barclay that --

19 THE COURT: I'm sure you would, that's not the  
20 point, but just that that analysis commends itself to  
21 the Court.

22 MR. WEINBERG: Yes, and I'm going to spend a few  
23 minutes on that issue, which is one of three issues.

24 THE COURT: Go ahead.

25 MR. WEINBERG: There's the general warrant issue

1 that Judge Saris addressed -- and I can't make an  
2 argument that the type of warrant that she addressed in  
3 **Klyushin** is meaningfully different than the warrants,  
4 the four warrants here. I'm not making factual  
5 distinctions, I'm appealing to you as a co-equal judge  
6 to consider that, with all due respect to the former  
7 Chief Judge, I don't think she got it right here. And  
8 I'll spend about 2 minutes doing that.

9 THE COURT: Go right ahead.

10 MR. WEINBERG: And then I'll go to probable cause,  
11 and then I'll go to the lack of particularity in the  
12 second part of the warrants, which is what can the  
13 government search the documents that the ISP's -- Apple  
14 have provided.

15 In terms of the general warrant issue, you know I  
16 raise it because -- you know not to be dramatic, but you  
17 know we work about a mile from the gravestone of James  
18 Otis, who's buried right across from the Parker House,  
19 and he's the Founder of the Fourth Amendment, and when I  
20 had an opportunity at one time to argue to the Supreme  
21 Court on a Fourth Amendment issue back in 1977 and '8,  
22 and it came from Judge Tauro's granting the suppression  
23 and the First Circuit adopting it and Department of  
24 Justice appealing it and it turned out to be a 7 to 2  
25 opinion in **Chadwick** that Justice Berger wrote. And it

1     dealt with the idea is the search warrant issue, the  
2     warrant clause limited to the home or does it extend to  
3     papers, and in that case it was a Footlocker at South  
4     Station?

5             The whole history of the Fourth Amendment is a  
6     railing by the Founding Fathers against writs of  
7     assistance where they went into warehouses and took  
8     everything, and later the customs people and the  
9     sovereigns, men would go through and decide, "Well  
10    that's criminal" and "That's not criminal."

11            In **Chadwick** the government said the warrant clause  
12    should be limited to the home. And when you read  
13    Justice Berger's decision, and I reread it last night,  
14    it quoted back to the seminal cases that said mail and  
15    papers and messages are as protected as the home. And  
16    here the government wouldn't come before the Court, I  
17    don't think, and say, "Give me a search warrant that I  
18    can serve on the U.S. Postal Inspectors, or the FedEx,  
19    or UPS, that allows them to open every package and give  
20    us every package, because of course texts and e-mails  
21    don't have the same closure that letters and packages  
22    do.

23            And the real issue is why isn't the government  
24    required and ordered not to seize this limited -- this  
25    limitless archive of messages, e-mails, location data,

1 Google searches? Why would they not be required to tell  
2 Apple or tell AT & T or tell Google, "We want only the  
3 messages that conform to probable cause," "Give us  
4 everything to do with that, give us every communication  
5 where the CHS, whose name is --

6 THE COURT: But isn't the answer to that the  
7 practical answer in today's world where, um -- to work  
8 backwards, the government will only be able to use --  
9 now this is not the most persuasive argument, because  
10 the problem with the search is the search. But they  
11 have these and they have in this case, via Judge  
12 Cabell's order, they have their filter teams doing the  
13 job and excluding, um, from the search, as I understand  
14 it, Mr. O'Donovan is a member of the profession, he is  
15 bound to keep confidential various communications with  
16 his clients that have nothing to do with the alleged  
17 criminal activity. They're not allowed to use that.  
18 But as a practical matter it's something like a wiretap,  
19 they have to see what they've got to then minimize, to  
20 exclude those things that don't have anything -- don't  
21 bear on the alleged criminality here.

22 MR. WEINBERG: And my contention would be, Judge,  
23 that in this world where an -- where an iCloud contains  
24 everything, and here the only limit on what they  
25 instructed Apple to do, "Give us everything" -- and a

1 date link, Apple ignored the date link, it so happened  
2 they gave the government more than they asked for. But  
3 there was no subject matter limitation. It was not  
4 saying to Apple, "We want all of the messages, all of  
5 the e-mails between Mr. O'Donovan and the following 10  
6 people." Instead they took everything. And that's a  
7 seizure, that's a government seizure, all e-mails, all  
8 texts, all iCloud, limited only by a name.

9 And I respectfully contend, and I know this  
10 Circuit's decided you can do that with a phone in **Upham**,  
11 you know 19 years ago, and Judge Gorton decided you  
12 could do it with an e-mail account. And in another case  
13 I had, **Kanodia**, Judge Saris the other day in **Klyushin**.  
14 But I think it's an important issue for the Circuit to  
15 deal with straight on. They came close to it in  
16 **Aboshady** where the lawyer wasn't pressing the issue I'm  
17 pressing, a general warrant on the first level, he was  
18 talking about retention. But I would respectfully  
19 request that your Honor grant it, but I understand if  
20 you're going to adopt Judge Saris's analysis, I'm saving  
21 it for an appeal.

22 THE COURT: You are and very skillfully too. I  
23 had a general warrant case back when I was a Superior  
24 Court judge and when, um, District Attorney Droney was  
25 the District Attorney in Middlesex and he had an

1 obscenity prosecution against a bookstore in Lowell.  
2 And he had a rather -- it had to do with the execution  
3 of the warrant, he had a more specific warrant. And as  
4 you've talked about warehouses, because I looked at the  
5 history too, they went in and took everything. I  
6 specifically have in mind they took "Cosmopolitan."  
7 But, um, that case, early in my judicial tenure, caused  
8 me to reflect on general warrants.

9 Well you've explicated the law. What else have  
10 you got here?

11 MR. WEINBERG: Okay.

12 Second, is the second search, your Honor, which  
13 the government, you know, first gets everything from the  
14 ISP and then they tell the law enforcement officers,  
15 "You are to look for evidence of bribery as to the  
16 following 8 or 9 categories." And there are two  
17 categories that I think are particularly significant in  
18 exceeding any alleged probable cause.

19 One is "Contacts with or about public officials  
20 who are influencing their authority under the licensing  
21 for approval of a marijuana establishment." That's  
22 Paragraph 2. The first one is for Medford, I get it,  
23 "If they satisfy you, there's probable cause." That's  
24 squarely within the probable cause.

25 To then say because there's these communications



1 with Medford, therefore we can go rummaging through his  
2 phone for every contact with every public official," I  
3 don't believe is supported by probable cause and  
4 therefore I think it's overbroad and should not be  
5 authorized by the Court. I think it should be narrowed  
6 to "So the objects conform to the probable cause."

7 Another one, which some judges, including your  
8 Honor in **Levasseur**, has been critical of is the request  
9 -- any evidence regarding the target accounts only,  
10 meaning Mr. O'Donovan's state of mind as it relates to  
11 the crimes under investigation.

12 Well, your Honor, you know warrant enforcement  
13 officers are not psychologists, they go and look at  
14 every state of mind, that's fairly delinked from hard  
15 probable cause, which is communications with a public  
16 official about a client in question. And there was one  
17 client, there's one public official that the government  
18 alleged where conversations went from, they claim, from  
19 legal to, they claim, illegal.

20 So I ask your Honor to look at Attachment B and  
21 determine whether or not it's overbroad and beyond the  
22 probable cause set forth in the affidavit.

23 THE COURT: Um, I had not thought of **Levasseur**,  
24 but you bring it back to mind. My problem in **Levasseur**,  
25 which is a domestic terrorism case which resulted in a

1 not-guilty and a hung jury, so we don't know what the  
2 basic facts were. I was concerned about the government  
3 trespassing on the free speech concerns because given  
4 the valid political expressions of this group, they had  
5 various pamphlets and the like, some, which I allowed,  
6 "How to make a bomb," um, given the nature of the  
7 charges. But it seemed to me that if they were reading  
8 what some would consider rather extreme left-wing data,  
9 so be it, that's what the First Amendment is all about.

10 But again as a practical matter, aren't you  
11 attacking a little early in the sense that if, um --  
12 they're not going to be able to use at trial the results  
13 of this search unless they, one, fall within your two  
14 challenged criteria, and more than that are relevant  
15 evidence.

16 Is that an inappropriate way to analyze it?

17 MR. WEINBERG: No. And contrasted to my first  
18 argument with the general warrant where there would be  
19 total suppression, your Honor is quite right, this is  
20 surgical expression of exhibits that might be offered by  
21 the government. I've got a pretrial duty and I don't  
22 want to waive this Fourth Amendment issue, so I'm  
23 raising it at this time, but not at all disputing that  
24 your Honor has the discretion to reserve that analysis.

25 THE COURT: And the third point?

1 MR. WEINBERG: The third point is probable cause.  
2 I'm anxious to read to your Honor the Supreme Court's  
3 oral argument in the **Rococco** case, which was argued to  
4 the Supreme Court on November 28, because it's very  
5 relevant to what divides the government and  
6 Mr. O'Donovan, and it's relevant and applicable to the  
7 warrants, because the first three affidavits are based  
8 on the first 7 conversations before they really started,  
9 you know feeding Mr. O'Donovan scripts they asked him to  
10 adopt or dispute certain fictional statements they made.  
11 Here is Justice Alito saying to the Solicitor General,  
12 and the Solicitor General's answer is the answer of the  
13 government.

14 So let's say this person is a childhood friend of  
15 the person. And again we're dealing here with  
16 Mr. O'Donovan's request to have a relative of a public  
17 official lobby the public official. Let's say this  
18 person is a childhood friend of a person, an elected  
19 public official. They played together in a high school  
20 football game. This person was the elected official's  
21 best man, his maid of honor at his wedding. Spearheaded  
22 the person's political career. Campaign manager for  
23 every campaign. Helped him get elected. Now he's a  
24 lobbyist. Lobbyists are lots of public officials, lots  
25 of clients. And the Solicitor General says, in answer

1 to the question "Well doesn't the statute -- how far  
2 does the sweep of lobbyist goes?" says, "Our position  
3 is, as in this case, consistently been that mere  
4 influence in not enough to trigger the honest services  
5 statute. Even if an individual is influential, even if  
6 they're extremely influential, that person doesn't have  
7 the indicia of being a government public official." And  
8 it's a little different because Rococco is the person  
9 receiving the money, not the lobbyist hired to give it.  
10 This whole transcript shows that the Court is interested  
11 in narrowing, not expanding honest services.

12 When your Honor looks at the affidavits --

13 THE COURT: Well I think that's true. I'm not  
14 insensitive that I was the presiding judge in the  
15 Probation case, and we see the First Circuit decision in  
16 that case driven appropriately by decisions of the  
17 Supreme Court. So I'm taking these matters very  
18 seriously.

19 MR. WEINBERG: And so here's the government, they  
20 start an investigation of a lawyer because the person he  
21 chose to lobby was a close relative. And in the first  
22 conversation, and they cite it at Paragraph 13 of the  
23 first affidavit, and in every affidavit, and I give them  
24 credit, to Agent Elio, for being candid with Judge  
25 Cabell, this is not a **Franks** argument, this is a facial

1 probable cause argument. He says, quoting  
2 Mr. O'Donovan, "Don't ask Jack," who's the public  
3 official, "Don't ask Jack for anything." Right in the  
4 first tape they're talking about, you know, "We want to  
5 ask Jack to give these guys," meaning Mr. O'Donovan's  
6 client, "a shake."

7 In the second affidavit they're recording a text  
8 that they got from the first seizure, he's talking to a  
9 public official saying, "Wait till you see my client's  
10 application, it's almost done, it's spectacular, it's  
11 going to be almost impossible to deny them unless  
12 there's local influence, unless DR, who's the Mayor's  
13 Chief of Staff, ducks with CAC." There's another quote  
14 saying, "Look, I only want an edge because everybody's  
15 trying to get an edge." And then there's all these  
16 bolded statements about Mr. O'Donovan offering to pay  
17 the relative of the public official, to lobby the public  
18 official, as if money -- as if the offer to pay a  
19 lobbyist, which is essentially what the relative was, he  
20 was asked to advocate or to lobby for the client that  
21 Mr. O'Donovan genuinely felt was the best candidate, and  
22 if only people read the applications on their merits and  
23 local politics didn't enter into it, would have been  
24 chosen as they were, as they were chosen.

25 THE COURT: This is a variation, and not even a

1 variation of your motion to dismiss.

2 MR. WEINBERG: It is.

3 THE COURT: And of course when I confronted your  
4 motion now to suppress, um, I realized that I can't just  
5 kick that ball down the road and say, "Well we'll get to  
6 that, we'll decide that someday," I have to decide now  
7 whether I'm going to, um, grant or deny the motion to  
8 suppress. So you're quite right to raise it.

9 Let me tell you how I've reflected on it, and  
10 please address this.

11 As I have reflected on it, I see that the  
12 government cites to me accurately cases where the money,  
13 the -- where the money passed to a third-party, not for  
14 the public official, and under the circumstances of  
15 those cases it was enough -- that's why we get the  
16 appellate cases, that the factfinder was convinced that  
17 the intention was to suborn the conduct of a public  
18 official by paying the money, that's how I read those  
19 cases. Here that's what they've alleged, it fits the  
20 statute.

21 And so I'm thinking, when I come on the bench,  
22 Well probably I should deny the motion to dismiss, if  
23 I'm going to deny the motion to suppress, but of course  
24 we're not clear how this case is going to be defended,  
25 and if the government has insufficient evidence for a

1 jury to conclude beyond a reasonable doubt that it was  
2 that criminal intention by paying the money, it will  
3 be -- and I'll put it on the record right now, it will  
4 be my duty under Rule 29 to dismiss -- to grant a  
5 directed verdict of acquittal at that point.

6 I'm a pretty transparent person, that's how I came  
7 on the bench, that's what I was thinking. And you're  
8 directly addressing it.

9 Isn't that the case here? There are these cases.  
10 I grant you I have no controlling case, nothing in the  
11 First Circuit -- well we'll hear what the government has  
12 to say. But as I understand it, nothing that requires  
13 that result. But we have these cases and at least as  
14 pled the indictment satisfies the statute.

15 MR. WEINBERG: So going back for a second to our  
16 last argument, of course the manufactured entrapment  
17 argument which your Honor reserved, should still be  
18 encouraged to be reserved because it's not to be  
19 determined on a probable cause basis or a good faith  
20 basis --

21 MR. WEINBERG: Oh, but you see I agree, this is  
22 different than entrapment, you see. It may be, and we  
23 don't know yet, and we, that is the government nor the  
24 judge, I don't know how you're going to present the  
25 defense. Entrapment is a different defense in my mind.

1 Here it's a failure of proof.

2 MR. WEINBERG: Yes.

3 THE COURT: A failure of proof because -- against  
4 a beyond-a-reasonable-doubt standard, a properly  
5 instructed jury could not conclude that the -- that  
6 these payments were to suborn the official -- the honest  
7 services of the public official. That's the statute.  
8 And that's -- if we get to the trial, that's how I would  
9 be going into the trial.

10 Now if entrapment is the defense, it's that he  
11 was -- entrapment, he has the intention to commit the  
12 criminal act, but the government manufactured that  
13 intention, he would not have but for the conduct of the  
14 government, that's how I understand entrapment. To me  
15 the two are different.

16 Am I making myself clear?

17 MR. WEINBERG: You're totally right. And we would  
18 not be arguing that he attempted to bribe and should be  
19 excused because the government, you know, pressured him.  
20 We will be arguing that he had an innocent  
21 predisposition and a good faith intent and never  
22 intended in any respect to breach honest services. But  
23 there will be evidence that the government's scripted  
24 conversations that comes late in the trial.

25 THE COURT: All right.



1 MR. WEINBERG: But for the purposes of today,  
2 the -- there would also be an argument, as we made last  
3 time at the conclusion of the government's proof, that  
4 not only should the case not go to the jury factually,  
5 but your Honor has the right to take it away from them  
6 not on an insufficiency of proof, but on an  
7 overbroadening by the government.

8 THE COURT: And we'll deal with that at the  
9 appropriate time. All right, I think I understand your  
10 argument.

11 MR. WEINBERG: But just one point. Which is the  
12 Court said that the cases indicate that a payment to a  
13 third-party, if it was intended to cause a breach of  
14 honest services, is enough to prove the government  
15 cases. All of them, your Honor, each one of them, and  
16 we argued it last time, is distinguished from this case  
17 by two factors. One is zero communications between him  
18 and the public official, never met him, never gave him a  
19 value, never said a word to him.

20 Number 2, and more important, is that in those  
21 cases the public officials engineered the payment to the  
22 third-party. Here the third-party, the middleman, the  
23 CHS, is asking for the money and charging as a lobbyist  
24 and wanting to know how much money he's getting paid.  
25 The public official didn't put the relative out there to

1 get money like the golf -- the example, "I'm going to  
2 get my kid to win 40,000 bucks at a hole-in-one golf  
3 tournament, or the political cases where the political  
4 figure benefited by giving jobs to all of his people.  
5 Here there's no involvement of the public official, all  
6 of it is between the relative and Mr. O'Brien and then  
7 the FBI comes in. And at one point he says, "Why don't  
8 I sit with the public official?" "No." The government  
9 could have -- we didn't need to have uncertainty, they  
10 could have taped him talking to the public official and  
11 the relative said, "Oh, no, you're not going to talk to  
12 my relative." So that's my argument on probable cause.

13 THE COURT: Thank you.

14 I'll hear the government.

15 MS. BARCLAY: Yes, your Honor. Just quickly on  
16 probable cause, because I think the government  
17 essentially rests on its briefing with respect to the  
18 motions to dismiss, but as your Honor said, it fits this  
19 statute, understanding that there are differences among  
20 the various factual scenarios of the cases that we  
21 cited.

22 THE COURT: Well what do you say to what he says  
23 are the two crucial factual differences?

24 MS. BARCLAY: So, your Honor, what I say about  
25 those is that this was a -- this was an operation, an

1 undercover operation where there was also a desire to  
2 protect the integrity of the marijuana process, right?  
3 So, um, there was no direct communication between  
4 Mr. O'Donovan and the Police Chief because the police  
5 Chief was walled off from the investigation to ensure  
6 that the process that they were going through was not  
7 impacted by the attempted buy.

8 THE COURT: I didn't mean that in any, um,  
9 pejorative way, but you acknowledge that the cases  
10 don't -- that this case is different from those cases  
11 where the public official -- I'm borrowing  
12 Mr. Weinberg's phraseology and maybe I should not, "put  
13 the third-party out there." This is different. You're  
14 not going to be able to prove, because the public  
15 official was walled off --

16 MS. BARCLAY: Right.

17 THE COURT: -- that he put the relative out there.  
18 That's different?

19 MS. BARCLAY: Right, but this was Mr. O'Donovan  
20 putting the third-party out there. So perhaps it's a  
21 distinction without a difference. Because it's his  
22 intent that governs here, and his intent was to pay the  
23 close reactive, the Police Chief, in exchange for the  
24 chief's official action.

25 So it's the same intent, it's Mr. O'Donovan making

1 the suggestion or making the approach here, which is  
2 slightly different than some of the cases Mr. Weinberg  
3 --

4 THE COURT: Right, you're saying it's different  
5 but legally it is not material?

6 MS. BARCLAY: Right.

7 THE COURT: Okay, I understand that.

8 MS. BARCLAY: And with respect to the second, the  
9 public -- I think he said that there was, um -- "The  
10 public official engineers payments to the third-party  
11 and there was no communication." I guess they're one  
12 and the same. Just the fact of the matter is it's the  
13 intent of Mr. O'Donovan that the government will have to  
14 prove here and he's the one who approached the close  
15 relative of the Police Chief with the intention of  
16 paying that relative in exchange for the chief's  
17 official action.

18 So that's with respect to probable cause, your  
19 Honor. If you want me to address the general warrant,  
20 I'm happy to do that. I think your Honor with the cases  
21 --

22 THE COURT: I don't think it's necessary. I do  
23 want -- I did want to hear from you.

24 All right, here's the ruling of the Court. And  
25 we'll deal with the issues in the order that

1 Mr. Weinberg raised them.

2 On the issue of whether this is a general warrant.  
3 In light of the controlling cases and persuaded really  
4 by my colleague Judge Saris's reasoning, this Court  
5 concludes that it was not a general warrant.

6 Second, with respect to the challenge to the two  
7 specific categories. In light of the processes set  
8 forth by the applicable rules of criminal procedure,  
9 again this is not the time to suppress those processes  
10 from going forward or enter any blanket suppression  
11 order. I will expect that the government's exhibits  
12 will be set forth by the time of the final pretrial  
13 conference in this case, at which time the Court can  
14 address any issues as to whether they were properly  
15 seized under these warrants in this case.

16 With respect to the issue of probable cause. Upon  
17 reflection, the Court denies the motion to dismiss  
18 insofar as this Court has kept it under advisement,  
19 because the indictment is, um, sufficient under the  
20 statute to withstand dismissal. The Court does not now,  
21 nor need it, express a legal opinion on the admitted  
22 factual differences between this case and the decided  
23 cases which have allowed honest services convictions to  
24 stand for two reasons. One, we may have further  
25 guidance from the Supreme Court of the United States.

1 And, two, the government is correct that Mr. O'Donovan's  
2 intent is the overriding concern here.

3 So having denied the motion to dismiss, it follows  
4 that the Court here, within that framework, also denies  
5 these motions to suppress. The rights of Mr. O'Donovan  
6 are saved.

7 That's the order of the Court. We'll adjourn.  
8 We'll recess.

9 (Ends, 2:35 p.m.)

10  
11 C E R T I F I C A T E  
12

13 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do  
14 hereby certify that the forgoing transcript of the  
15 record is a true and accurate transcription of my  
16 stenographic notes, before Judge William G. Young, on  
17 Monday, December 19, 2022, to the best of my skill and  
18 ability.

19  
20  
21 /s/ Richard H. Romanow 01-12-2023

22 \_\_\_\_\_  
23 RICHARD H. ROMANOW Date  
24  
25